Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

UNITED MEXICAN STATES, MIGUEL ANGEL GONZALEZ, Legal Advisor of Secretary of Foreign Relations of Mexico; LUIS CABRERA, Counsel General of Mexico in the State of Arizona,
PETITIONERS,

-VS-

GRANT WOODS, Arizona Attorney General; TERRY L. STEWART, Director of Arizona Department of Corrections; MEG SAVAGE, Warden, Arizona State Prison, Florence, Arizona,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit err by upholding the district court's dismissal of Petitioners' suit against three Arizona state officials for lack of subject-matter jurisdiction because the suit is barred by the Eleventh Amendment?

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OPINION BELOW

Petitioners seeks issuance of a writ of certiorari to review the Ninth Circuit's opinion in *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on October 7, 1997. On October 20, 1997, Petitioners filed a petition for rehearing, with a suggestion for rehearing en banc, which was denied by the Ninth Circuit on November 21, 1997. Petitioners filed the petition for writ of certiorari on February 18, 1997, within 90 days of denial of the petition for rehearing. This Court has jurisdiction pursuant to U.S. Const. art. III, § 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1. The subject-matter jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

A. Martinez-Villareal's conviction and subsequent review.[1]

Ramon Martinez-Villareal was convicted of two murders and sentenced to death, based on two aggravating factors (depravity—he boasted to a traveling companion that he had killed the helpless victims merely to show how "manly" he was—and commission for pecuniary gain) that were not offset by any mitigation. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Martinez-Villareal*, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985).

Beginning in 1986, Martinez-Villareal, represented by various attorneys, litigated several federal habeas corpus petitions and two state post-conviction ("Rule 32") petitions, which resulted in stays of execution, but no substantive relief. *See Martinez-Villareal v. Arizona*, 493 U.S. 874 (1989) (denying certiorari review of second Rule 32 proceeding). In 1990, the federal district court issued another stay of execution and appointed yet another attorney (Sean Bruner) to represent Martinez-Villareal. In 1991, after Bruner suggested, for the first time, that Martinez-Villareal might be mentally incompetent to be executed, the district court ordered the pending habeas petition dismissed without prejudice, so that this issue could be litigated in the state courts.

The competency for execution claim, together with 30 other claims, was raised in a third Rule 32 petition, but the trial court summarily denied relief, ruling that all but three of the claims were precluded, and that those three raised nothing on which relief could be granted. The competency for execution claim was denied because it should not have been brought in a Rule 32 proceeding at all, but under a separate statute specifically dealing with such claims, A.R.S. §§ 13-4021 to -24. The Arizona Supreme Court denied review, and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 506 U.S. 893 (1992).

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1. This procedural history has, to a large extent, been set forth by the State of Arizona in *Stewart v. Martinez-Villareal*, No. 97-300, (U.S. filed Sept. 22, 1997), *cert. granted*, 118 S. Ct. 294 (Oct. 14, 1997). This Court heard oral argument in No. 97-300 on February 25, 1998. Thus, this Court is obviously somewhat familiar with the procedural history, but it is recounted here for the Court's convenience.

Bruner then filed an amended habeas corpus petition, arguing many of the claims presented in the Rule 32 proceeding. The district court rejected most of them, but ordered that Martinez-Villareal be resentenced, on the theory that he had received ineffective representation during the original sentencing. The district court left unresolved the issue of Martinez-Villareal's competency to be executed, holding that the claim was not "ripe" for decision—there was then no warrant for his execution and the claim had not been exhausted in the state courts because no proceeding had ever been brought under the state's competency statute. On appeal, the Ninth Circuit vacated the resentencing order so that Martinez-Villareal was not granted relief of any kind. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996).

Left unresolved was the competency issue, which the Ninth Circuit found had been brought to the federal courts "premature[ly];" it specified that its order "to enter judgment denying the petition [was] not intended to affect any later litigation of that question." 80 F.3d at 1307 and 1309 n.1. In early 1997, the defense finally filed a motion under the state statute dealing with competency for execution and requested a hearing. The Arizona Supreme Court issued an execution warrant for April 16, 1997, but reset the execution to May 21, 1997, to allow Martinez-Villareal more time to prepare for the hearing. The trial judge concluded that Martinez-Villareal was competent to be executed. On May 16, 1997, the Arizona Supreme Court unanimously agreed that Martinez-Villareal is competent for execution and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 117 S. Ct. 1840 (1997).

Whether the competency issue could be further reviewed by the federal courts in view of the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), was the subject of further litigation, resulting in the Ninth Circuit's staying the execution on May 19, 1997. *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997). Arizona's application to this Court to vacate the stay was denied. *Stewart v. Martinez-Villareal*, 117 S. Ct. 1840 (1997). The Ninth Circuit subsequently issued an opinion holding that the new action was not a successive petition, and therefore not barred by AEDPA. *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). This Court granted certiorari review of that opinion on October 14, 1997, and heard oral argument on February 25, 1998.[2]

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2. Petitioners filed an amicus brief in that matter.

This case represented the opening of a new battlefront in the Martinez-Villareal litigation. As noted previously, Martinez-Villareal's execution was set for Wednesday, May 21, 1997. Petitioners, the United Mexican States and two Mexican officials, filed their complaint on Friday, May 16, 1997. That same day, Respondents (the Arizona Attorney General, the Director of the Department of Corrections, and the Warden of the Arizona State Prison), filed a motion to dismiss the complaint for lack of subject-matter jurisdiction.[3] The district court granted the motion and dismissed the complaint on Monday, May 19, 1997—concluding that it lacked subject-matter jurisdiction because of the Eleventh Amendment.[4] (Petitioners' Appendix at C-9). However, the Ninth Circuit stayed the execution for other reasons, as previously discussed. Petitioners' and Respondents' briefs to the Ninth Circuit addressed both the Eleventh Amendment issue and a justiciability issue (the latter issue raised by the Ninth Circuit), and the matter was submitted without oral argument, on June 3, 1997. The Ninth Circuit issued its opinion on October 7, 1997, holding that the Respondents were immune from suit under the Eleventh Amendment, and that the *Ex Parte Young* exception did not apply.[5] 126 F.3d at 1223–24.

On October 20, 1997, Petitioners filed a petition for rehearing and suggestion for rehearing on banc. The petition was denied on November 21, 1997, with no judge requesting a vote on whether to hear the matter en banc. (Petitioners' Appendix at A–2).

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3. Petitioners incorrectly assert that the motion was a Rule 12(b)(6) motion, rather than a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. (Petition at 3.) No doubt due to the time pressure of having approximately 2 hours to compose and file the motion to dismiss, Respondents' motion did include a typographical error citing Rule 12(b)(6), rather than Rule 12(b)(1). However, Respondents' reply to Petitioners' response cited Rule 12(b)(1). The federal district court, apparently recognizing the typographical error in the motion to dismiss, correctly treated the motion as one based on Rule 12(b)(1) because it alleged lack of subject-matter jurisdiction. (Petitioners' Appendix at C-1, n.1).

4. The district court also found that, except for federal habeas corpus, a federal district court has no authority to review final judgments of a state court judicial proceeding, citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). (Petitioners' Appendix at C–8.) The Ninth Circuit opinion did not discuss this issue.

5. Because it disposed of the case on the Eleventh Amendment issue, the Ninth Circuit found that it was not necessary to consider the justiciability issue. 126 F.3d at 1224, n.3.

REASONS FOR DENYING THE WRIT

I

THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION AND OPINIONS FROM THIS COURT OR OTHER CIRCUITS.

Petitioners argue, as their first reason for this Court to grant the petition, that the Ninth Circuit's opinion conflicts with opinions from this Court and other federal circuit courts. *See* Supreme Court Rule 10. Petitioner, however, fails to establish a conflict—there is none. First, the Fourth Circuit is the only other federal court of appeals that has considered the issue presented, and its opinion is fully in accord with the Ninth Circuit's opinion. *See Republic of Paraguay v. Allen*, 1998 WL 19933 (4th Cir. 1998) (to be reported at 134 F.3d 622). Second, there is no conflict between the Ninth Circuit's opinion and the opinions of this Court or other circuits.

A. *The Ninth Circuit and Fourth Circuit Opinions.*

Petitioners grudgingly admit, in a footnote, that the Fourth Circuit's *Paraguay* opinion, "reached the same conclusion" as the Ninth Circuit. (Petition at 10, n.2) Petitioners disingenuously attempt to downplay the strikingly parallel analyses in the Fourth and Ninth Circuit opinions by saying that the former court "did not in any way rely on the Ninth Circuit's analysis." (*Id.*) Assuming that the statement is true, the fact that the two circuits' analyses are so similar conclusively demonstrates the lack of merit in Petitioners' position. Both opinions agree that the Eleventh Amendment clearly bars a suit by a foreign government or its officials against a state (the entity obtaining a prisoner's convictions and sentences). 126 F.3d at 1222; 1998 WL 19933, at *3. Both then consider the applicability of the Eleventh Amendment exception set forth in *Ex Parte Young*, 209 U.S. 123 (1908). 126 F.3d at 1222; 1998 WL 19933, at *4. Both analyze whether the plaintiffs' requested relief is permitted prospective relief, or prohibited retrospective relief; both conclude that the relief would be retrospective. 126 F.3d at 1223; 1998 WL 19933, at *4. The Fourth Circuit states:

> But when the essence is considered, the only presently effective relief sought for the violations claimed and conceded is

> quintessentially *retrospective*: the voiding of a final state conviction and sentence.

1998 WL 19933, at *5 (emphasis added). The Ninth Circuit states:

> In no event, however, can the conviction or sentence be considered as a dynamic event, to be examined in a prospective fashion. The facts relating to the analysis of whether the proceedings met constitutional requirements are fixed and must be viewed through a *retrospective* lens.

126 F.3d at 1223 (emphasis added). Accordingly, both opinions conclude that the lawsuits do not fall within the *Ex Parte Young* exception, so the federal courts have no subject-matter jurisdiction because of the Eleventh Amendment bar. 126 F.3d at 1223–24; 1998 WL 19933, at *6. The Fourth Circuit's opinion ends by citing the Ninth Circuit's "holding to same effect in affirming dismissal on Eleventh Amendment immunity grounds of comparable action by Mexico and Mexican officials against Arizona officials." 1998 WL 1993, at *6.[6] [7]

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6. It is hardly surprising that the Fourth Circuit did not extensively discuss the Ninth Circuit opinion. In *Paraguay*, the issues were extensively briefed (including several amicus briefs), and parties presented oral arguments on June 4, 1997; *United Mexican States* was submitted, upon more limited briefing and without argument, on June 3, 1997. The Ninth Circuit opinion did not issue until October 7, 1997, so the Fourth Circuit, having already worked on its opinion for 4 months, had little reason to rely extensively on the Ninth Circuit opinion.

7. Petitioner also attempts to distinguish *Paraguay* by claiming that it "did not involve the ICCPR [International Covenant on Civil and Political Rights] and other claims made here." (Petition at 10, n.2.) That statement is partially true—*Paraguay* did not involve the ICCPR. The latter part of the statement, however, is false—both *Paraguay* and this case involved the Vienna Convention on Consular Relations. *See* 126 F.3d at 1223; 1998 WL 19933, at *2. Also, although *Paraguay* involved the "Friendship Treaty" between the United States and Paraguay, and this case involved the Consular Convention Between the United States and Mexico, both claims based their right to consular notification on the granting of that right by the United States in conventions with the United Kingdom and Union of Soviet Socialist Republics. *See* 1998 WL 19933, at *2, n.2; Complaint of United Mexican States, at 6–8). Therefore, there was, and is, a substantial overlap between the treaties involved in *Paraguay* and this case. However, Respondents submit that it simply does not matter what treaties are involved, the Eleventh Amendment bar on attacks by a foreign nation against a state criminal conviction and sentence applies, without regard to which treaties are cited.

B. *There is no conflict with opinions of this Court or of other circuit courts.*

Petitioners attempt to manufacture a conflict by citing opinions involving much different factual situations (school funding and employee reinstatements) and analyses. Under Petitioners' broad definition of a conflict, the Ninth Circuit opinion would conflict with any opinion finding the *Ex Parte Young* exception applicable. Respondents will briefly distinguish the opinions cited by Petitioners, first discussing this Court's opinions, and then discussing the alleged conflict with other circuit court opinions.

1. This Court's opinions.

Petitioner cites, as conflicting, *Papasan v. Allain*, 478 U.S. 265, 106 S. Ct. 2932 (1986), which is easily distinguishable. *See Paraguay*, 1998 WL 19933, at *5. In *Papasan*, the plaintiffs sought injunctive relief to *compel equalizing funding* of a school district that had been, and continued to be, underfunded in relation to other districts in the state as a result of the State's unconstitutional sale, 100 years earlier, of property held in trust for the district's support. Thus, *Papasan* involved a classic example of seeking injunctive relief, in the nature of *future* equalized funding, to counter presently-experienced harmful consequences of past conduct that constituted ongoing violations of federally-protected constitutional rights. In this case, by contrast, Petitioners' complaint contained seven paragraphs requesting declarative relief, while the only substantive injunctive relief requested was "requiring vacation of Mr. Martinez Villareal's conviction and sentence and mandating that the defendants,[8] in any future proceedings involving Mr. Martinez-Villareal, afford plaintiffs all rights due them . . . ." (Petitioners' Appendix at C-6). They also requested a temporary restraining order that Respondents not execute Martinez-Villareal until the

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8. As noted in the district court opinion, none of the named Respondents had been involved in obtaining the judgment against Martinez-Villareal. (Petitioners' Appendix at C-7). Nor would they be involved in a retrial or resentencing, so it is difficult to understand how the requested injunctive relief lies against the named defendants. Also it is difficult to see how Petitioners would have standing to, other than bringing the suit, request relief in the form of invalidation of the conviction. *See Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) (federal court has no jurisdiction to entertain a suit brought by a third party that asserts the invalidity of a state prisoner's conviction or sentence, unless the third party demonstrates that the prisoner is unable to litigate the claims himself.)

merits of their claims could be examined. (*Id.* at C-7). Thus, unlike the future funding requested in *Papasan*, Petitioners essentially wanted to go back in time and undo Martinez-Villareal's conviction and sentence. Accordingly, the Ninth Circuit's opinion does not conflict with *Papasan*.[9]

Milliken v. Bradley, 433 U.S. 267, 269 (1977) concerned a *Young* suit against various Michigan officials resulting in a federal district court order requiring the State, along with the Detroit School Board, to pay for a comprehensive education program for school children because of the State's "official acts of racial discrimination committed by both the Detroit School Board and the State of Michigan." The relief granted in that case was, once again, prospective in nature, requiring the defendants to pay, in the *future*, funds to ameliorate the effects of past conduct. *Paraguay* distinguishes *Milliken* as follows:

> As the district court put it, the state-official defendants in Milliken were "in violation of federal law at the precise moment

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9. Indeed, *Papasan* states that the *Young* exception may not be applicable if the suit would "upset the balance of federal and state interests that it embodies." 478 U.S. at 277. If the federal courts, utilizing *Papasan*, extended *Young* to attacks on state prisoners' convictions and sentences, it would completely upset the delicate interplay between state and federal interests in collateral attacks on state criminal convictions and sentences. There would be no need for 28 U.S.C. § 2254, because prisoners could just sue under § 1983 for alleged "ongoing violations" (attempted enforcement of death sentences in capital cases, imprisonment in non-capital cases) resulting from their convictions and sentences, and request as relief that the federal courts enjoin executions and vacate the convictions and sentences. However, this Court has made quite clear that § 2254 is the only method available for state prisoners to attack their convictions and sentences. *See Edwards v. Balisok*, ___ U.S. ___, 117 S. Ct. 1584, 1587 (1997) (a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can demonstrate that his conviction and sentence have been previously invalidated); *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364 (1994) (same); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (holding that claims challenging the validity of a state prisoner's conviction and sentence are not cognizable in a § 1983 proceeding, only in a § 2254 proceeding); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303 (1983) (holding that, except for habeas corpus review, a federal district court "has no authority to review final judgments of a state court in judicial proceedings"). Moreover, even before AEDPA, this Court made clear that § 1983 could not be utilized to avoid the § 2254 limitations on successive habeas petitions. *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1301 (1996); *Gomez v. United States District Court*, 503 U.S. 653, 653-54 (1992).

> when the case was filed." [citation omitted]. Here, by contrast, again as the district court indicated, Paraguay's claim was not, as it could not be, that Commonwealth officials were continuing to prevent Paraguay, either by action or non-action, from providing aid and counseling to Breard at the time Paraguay filed its action.

1998 WL 19933, at *5. Similarly, in this case, as the district court found, there were no present violations because "Plaintiffs have been in contact with Mr. Martinez-Villareal since at least 1991." (Petitioners' Appendix at C-7). Whe a trial court's ruling on jurisdiction is based in part on the resolution of a factual dispute, a reviewing court must accept the district court's factual findings unless they are clearly erroneous. *E.g.*, *R.M.I. Titanium v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996); *Osborn v. United States*, 918 F.2d 724, 732 (8th Cir. 1990). Therefore, there was no violation of federal law by Respondents at the moment Petitioners' complaint was filed.

The Ninth Circuit's (and the Fourth Circuit's) discussion of the Eleventh Amendment and *Young* are perfectly consistent with this Court's opinions. Indeed, this Court's recent opinions have tended to limit the applicability of *Young*, not extend it. *See Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S. Ct. 2028, 2040-43 (1997) (finding *Young* not applicable to avoid Eleventh Amendment bar to suit by tribe against Idaho for *injunctive relief* precluding state officers from exercising governmental powers and authority over disputed lands and waters); *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1136-37 (1996) (*Young* exception not applicable, so Eleventh Amendment bars Seminole tribe from suing for *injunctive relief* to compel the Florida Governor to negotiate a compact with the tribe under the Indian Gaming and Regulation Act). Petitioners' proposed expansion of *Young* to allow retrospective, collateral attacks on state convictions and sentences would sharply conflict with this Court's Eleventh Amendment, and habeas corpus, jurisprudence.

It is textbook constitutional law that the Eleventh Amendment precludes federal-court jurisdiction over suits by a foreign country, or a citizen of a foreign country, against a state. U.S. Const., amend. XI; *Seminole*, 116 S. Ct. at 1136-37; *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 330 (1933). As this Court said in *Monaco*:

> Controversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative. . . . The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found through treaty, agreement of arbitration, or otherwise. It cannot be supposed that it was the intention that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign state . . . should be taken out of the sphere of international negotiations and adjustment through a resort by a foreign State to a suit under the provisions of section 2 of article 3. In such a case, *the State has immunity from suit without her consent*, and the National Government is protected by the provision prohibiting agreements between States and foreign powers in the absence of the consent of Congress.

292 U.S. at 311–12 (emphasis added). *Monaco* explains the underlying rationale for the Eleventh Amendment prohibition, which is that a foreign country "lies outside the structure of the Union," and cannot partake of any waiver of state sovereign immunity that "inheres in the acceptance of the constitutional plan." 292 U.S. at 310.[10]

Petitioners seek to misuse *Young* to avoid *Monaco's* strong proscription against such lawsuits. *Young* should not be used as a device to impose a basic restructuring in the relations between foreign states and American states. First, the mere fiction of naming as defendants three state officials (the Attorney General of Arizona, the Director of the Arizona Department of Corrections, and the Warden of the State Prison), does not defeat the Eleventh Amendment, otherwise "the Eleventh Amendment

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10. This Court "has never questioned this basic framework [of Eleventh Amendment immunity] set forth in Monaco v. Mississippi." *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 486 (1987) (plurality opinion). As recently as *Seminole*, the Court has stated, "In *Principality of Monaco v. Mississippi* [citation omitted], the Court held that the Eleventh Amendment barred a suit against a state by a foreign state." 116 S. Ct. at 1129. Indeed, in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 781 (1991), the Court *extended* the rationale of *Monaco* to suits by Indian tribes, stating, "Just as in Monaco with regard to foreign sovereigns, so also here with regard to Indian tribes, there is no compelling evidence that the Founders thought such a surrender [of immunity] inherent in the constitutional compact."

would have force only in the rare case in which a plaintiff foolishly attempts to sue the State in its own name." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984). The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest. *Coeur d'Alene Tribe*, 117 S. Ct. at 2034; *Pennhurst*, 465 U.S. at 101; *Quern v. Jordan*, 440 U.S. 332, 345 n.17 (1979); *Cory v. White*, 457 U.S. 85, 89, (1982). In this case, as the Ninth Circuit noted, the judgment against Martinez-Villareal was not obtained by any of the named defendants, it was obtained by the State of Arizona. 126 F.3d at 1222. As this Court said in *Pennhurst:*

> The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself.

465 U.S. at 107–08. *See also Quern*, 440 U.S. at 345 n.17 (key inquiry is whether the state officer is in fact the real party in interest or whether he is only a nominal party); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) (state cannot be controlled by suits against officials); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296 (1937) ("[A] suit nominally against individuals, but restraining or otherwise affecting their actions as state officers, may be in substance a suit against the state, which the Constitution forbids"). Because Petitioners sought invalidation of the judgment, the action was necessarily one against the State of Arizona, and therefore barred by the Eleventh Amendment.

Petitioners are dead wrong in asserting that "'retrospective' relief is prohibited because of monetary considerations that do not apply here." (Petition at 6). The Eleventh Amendment bar applies "regardless of the nature of the relief being sought." *Pennhurst*, 465 U.S. at 119, citing *Missouri v. Fiske*, 290 U.S. 18, 27 (1933). The Ninth Circuit correctly held that *Young* applies only to *continuing violations* of federal law, requiring prospective relief. *See Green v. Monsour*, 474 U.S. 64, 73 (1985) ("We think that these cases demonstrate the impropriety of a declaratory judgment in this case. There is no claimed continuing violation

of federal law"); *Cory v. White*, 457 U.S. at 90. Petitioners claimed a past violation of international law, and requested "vacation of Mr. Martinez-Villareal's conviction and sentence," and provision of international-law rights in future proceedings; and requested issuance of "a temporary restraining order restraining and enjoining defendants from executing Ramon Martinez-Villareal until such time as the merits of this action can be examined." (Petitioners' Appendix at C-6 to -7.) Thus, there was no claim for relief for continuing violations.

Moreover, to apply *Young* to this situation would be contrary to this Court's opinion in *Seminole*. In *Seminole*, this Court found that *Young* did not aid the plaintiffs because Congress, in enacting the Indian Gaming Regulatory Act (IGRA), had created its own remedial scheme for enforcement of the Tribes' rights under the act. 116 S. Ct. at 1133. It noted that Congress, having created liability for the states that was significantly more limited than that which would otherwise apply under *Young*, must not have intended for the latter to apply. 116 S. Ct. at 1132–33. In this case, Congress has created an extensive statutory scheme, 28 U.S.C. § 2254, to regulate collateral attacks on state convictions and sentences. The fact that Congress has enacted a remedial scheme strongly indicates that it did not intend to allow foreign states to pursue collateral attacks on state convictions and sentences, pursuant to *Young*. As this Court is well aware from the briefing and argument in *Stewart v. Martinez-Villareal*, No. 97–300, Martinez-Villareal's conviction, sentence, and competency to be executed, have, and continue to be, the subject of extensive litigation in state and federal courts.

Thus, the Ninth Circuit's opinion does not conflict with this Court's opinions. Rather, it is fully in accord with this Court's opinions, as discussed above.

2. Other circuit court opinions.

The first circuit opinion upon which Petitioner relies to establish a conflict is *Russell v. Dunston*, 896 F.2d 664 (2nd Cir. 1990). In that case, the plaintiff was a New York state employee who was disabled when he was struck on the head while trying to break up a fight during the course of his employment. Eventually, the plaintiff's benefits were cut off, and the Comptroller issued a final determination denying his application for benefits. The plaintiff then filed a § 1983 action for an injunction requiring the state-official defendants to reinstate him on medical leave and to

determine his eligibility for retirement benefits on the merits. The district court dismissed, finding that the complaint sought a retroactive remedy against the state, which was barred by the Eleventh Amendment. 896 F.2d at 666–67. The Second Circuit framed the issue as whether the injunction requested "prospective" relief under *Young*. Relying on previous Second Circuit opinions, the court found that reinstatement to medical leave was prospective relief, and was not barred by the Eleventh Amendment. 896 F.2d at 668.

Considering the necessary balancing of state and federal interests that underlie the Eleventh Amendment, the differences between a plaintiff's attempt to get his own medical leave reinstated and a foreign nation's attempt to have one of its national's state criminal conviction and death sentence vacated, are so massive as to scarcely require elaboration. Suffice it to say that *Monaco*, and this Court's long-expressed concern regarding collateral attacks on state criminal convictions and sentences, make this case distinguishable from *Russell*.

Petitioners also rely on the Fourth Circuit's opinion in *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989). However, in *Paraguay*, the Fourth Circuit distinguished its own opinions in *Coakley* and another case cited by Paraguay:

> Paraguay's reliance on *Coakley* . . ., is misplaced. Coakley held that a state employee unconstitutionally discharged from his employment suffers a "continuing violation" of that property right that could be remedied by a federal injunctive decree requiring reinstatement. . . .. Again, these cases concerned classic claims of ongoing violations of federally-protected property and liberty rights. As in Milliken and Papasan, responsible state officials were presently violating the claimants' ongoing rights.

1998 WL 19933, at *5. Once again, the named Respondents were not violating Petitioner's rights when the complaint was filed, and the only substantive relief Petitioners sought was vacation of Martinez-Villareal's conviction and sentence.

3. Conclusion to argument.

Accordingly, there is no conflict between the Ninth Circuit's ruling in this case and decisions by this Court, or other decisions by other United States Courts of Appeals. Thus, this alleged basis for certiorari review is unpersuasive.

II

THE ISSUE PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO MERIT USE OF THIS COURT'S SCARCE RESOURCES.

Petitioners assert, as a second reason to grant certiorari, that this case presents an important issue of whether state officials are disregarding treaty obligations of the United States. Respondents submit that the issue presented is not sufficiently important to merit application of this Court's scarce certiorari resources.

First, one must wonder if the issue is of such widespread importance, why there are only two federal circuit court opinions on point? Assuming, *arguendo*, that the Arizona authorities in this case violated Martinez-Villareal's rights under the cited treaties, that the Virginia authorities sued in *Paraguay* violated Breard's rights, and even assuming that unnamed Texas officials, backing up their "tough talk" (Petition at 12), have violated one or more foreign national's treaty rights—such scattered incidents scarcely justify use of this Court's resources in view of the thousands of issues of more widespread importance that are constantly clamoring for this Court's consideration. Similarly, Petitioners' suggestion that other nations will go on a vendetta against American nationals because of the alleged treaty violations is pure speculation that does not merit this Court's grant of certiorari review.

Second, assuming a violation of the Vienna Convention, is the practical effect of the violation sufficient to warrant this Court's attention? As the Fourth Circuit noted in *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997):

> Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty

> provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional rights*.

(emphasis in original.) The court noted that the Mexican national in that case, Murphy, had failed to establish prejudice "because he is unable to explain how contacting the Mexican consulate would have changed either his guilty plea or his sentence." *Id.* Similarly, in *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996), the Fifth Circuit noted that Texas had admitted there was no evidence that Faulder had been advised of his rights under the Convention, but concluded, "the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained." *See also Celestine v. Butler*, 823 F.2d 74, 79–80 (5th Cir. 1987) (rejecting habeas prisoner's claims that trial and sentence violated international treaties; there was no indication that the treaties were intended to modify the legal analysis required by the United States Constitution as interpreted by the United States Supreme Court). Under the Vienna Convention, the primary purpose of requiring notice to an arrested foreign national regarding his right to contact his consulate is so that the consulate may insure that he or she is represented by counsel. See Vienna Convention at Article 5(I) and Article 36(c). Thus, the alleged violations of the Vienna Convention by Respondents, or other state officials, have little practical effect because foreign nationals are already guaranteed the appointment, and effective assistance, of counsel under the Sixth Amendment of the United States Constitution.[11]

Third, assuming, once again, that there was a technical violation of the cited treaties, the record in this case shows that the Mexican Consulate was, in fact, aware that Martinez-Villareal was being tried, and was monitoring the proceeding. Attached to Respondents' opposition to Petitioners' request for a stay by the Ninth Circuit was an affidavit from Tom McGrew, the son of one of the victims. (Appendix A.) The affidavit

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11. Petitioners harp on the fact that the federal district judge found that Martinez-Villareal received ineffective assistance at sentencing, but the Ninth Circuit found that this claim of ineffective assistance was procedurally barred, so that finding is void. Martinez-Villareal is in no different position than other state prisoners whose ineffective assistance claims are found procedurally barred because they were not fairly presented to the state courts. Martinez-Villareal is not entitled to the application of different procedural default rules merely because he is a foreign national who abused the hospitality of this country by killing an American citizen.

states that, before or during the trial, he believed that people were overlooking the fact that the second victim, Fernando Estrada-Babichi, was a Mexican national. McGrew went to the Mexican Consulate, met with a woman official there, and told her of his concerns. She said the Mexican government was concerned with the proceedings and would monitor them. Therefore, this is not a case where the foreign government was unaware that an American state was trying one of its nationals. Petitioners could easily have stepped in to assist Martinez-Villareal before, or during, trial if they had been concerned that the proceedings were unfair. Instead, they waited until just 5 days before the execution date to attack the conviction and sentence that the State of Arizona had obtained some 14 years earlier.[12]

Fourth, it is not even clear that the treaties create any rights that are enforceable in American courts to benefit Martinez-Villareal by having his conviction and sentence overturned. The Vienna Convention is not self-executing. *See Republic of Paraguay v. Allen*, 949 F. Supp. 1262, 1274 (E.D. Va. 1996), *aff'd Paraguay*, 1998 WL 19933 (4th Cir. 1997). The Convention itself indicates that all of the signatories, "Realiz[e] that the purposes of such [consular] privileges is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states." 21 U.S.T. at 79. The United States-Mexico Convention is plainly directed at consular officials (not private persons), and it expressly indicates (Art. VI, Sec. 1) that the remedy for a violation is "interposition through the diplomatic channel." Moreover, that Convention does not require notification to the national of his right to access, or notification to the consul of the arrest, it only establishes the right of a consul who has knowledge of such arrest to contact and assist the national. Art. VI, Sec. 2. Finally, application of the ICCPR to Martinez-Villareal is extremely problematic. Martinez-Villareal was tried, and sentenced, in 1983—the ICCPR did not even enter into force for the United States until September 8, 1992. 31 I.L.M. 645. The district court, basing its dismissal on the Eleventh Amendment, determined that it did not need to decide applicability of the treaty's provisions to Martinez-Villareal, but noted, "This raises a question of whether the ICCPR can be applied retroactively in that defendants' alleged failure to provide competent

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12. As discussed earlier, the district court found that Petitioners had been in contact with Martinez-Villareal since at least 1991. Respondents' reply (to Petitioners' response to the motion to dismiss) argued that Petitioners' suit was also barred by laches, but the district court did not consider this theory.

counsel occurred in 1983." (Petitioners' Appendix at C-7 to -8). Moreover, the Senate's reservations to the treaty clearly state that ratification of the treaty provides no more than what is provided by the Constitution: "(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, ..." 31 I.L.M. 659. Thus, Martinez-Villareal had, under the ICCPR, no right to counsel beyond that provided by the Constitution, an issue that has been thoroughly litigated in state and federal courts over the past 15 years. Furthermore, the Senate's ratification expressly provides that the provisions of the treaty are not self-executing, which means that the treaty is not directly enforceable as United States law in United States courts. 31 I.L.M. 649, 661.

Petitioners assert that they "deserved at least the opportunity to brief its claims fully and to be heard on them." (Petition at 12-13). The issue presented has been considered by two federal district judges and by six appellate judges from the Fourth and Ninth Circuits—none of these eight federal judges has found even a glint of merit to the argument that the Eleventh Amendment does not bar such suits. Furthermore, Petitioners filed a petition for rehearing, with a suggestion for rehearing en banc, but *not one judge of the Ninth Circuit* requested a vote on whether to hear the matter en banc. This Court need not grant certiorari merely to give Petitioners the satisfaction of more fully briefing the issue, especially when the resolution of the issue is so clear.[13]

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13. Moreover, denial of certiorari does not leave Petitioners without remedies. Mexico has the political remedy of filing a protest with the United States government and seeking redress through diplomatic channels. *See United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (United States forcibly abducted an individual from Mexico, despite extradition treaty between United States and Mexico; Mexican government's remedy was to file a protest with the United States government); *see also Foster v. Neilson*, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department"). Thus, in the first instance, the United States' response to the alleged violations of the treaties is one to be made by the executive branch of the United States government, not by Respondents in federal courts. Also, as noted by the district court, the ICCPR establishes a Human Rights Commission that oversees compliance and investigates reports of non-compliance made by one party against another. (Petitioners' Appendix at C-9). Finally, the optional protocol on dispute resolution under the Vienna Convention provides that nations can take disputes arising out of interpretations of the Convention to the International Court of Justice. See 21 U.S.T. 325, 326, 596 U.N.T.S. 487.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

AFFIDAVIT

STATE OF ARIZONA)
) SS
COUNTY OF SANTA CRUZ)

I, Tom McGrew, being duly sworn upon my oath, do depose as follows:

1) I am the son of James McGrew, one of two victims for which Ramon Martinez-Villareal was charged and convicted of first degree murder;

2) Before or during the trial in Santa Cruz County in April of 1983 I became concerned it was being overlooked that the other victim, Fernando Estrada-Babichi, was a Mexican National;

3) Because of this concern I went to the Mexican Consulate in Nogales, Arizona and was granted an audience with a woman official of the Consulate;

4) When I informed her of my concerns she said the Mexican Government was concerned with the proceedings and would monitor those proceedings.

Dated: May 19, 1997

s/ Tom McGrew
Tom McGrew
Tumacacori, Arizona

On this 19th day of May, 1997, Tom McGrew personally appeared before me and affixed his signature to the foregoing instrument for the purpose stated therein.

s/ Carmen C. Escobar
Notary Public

My Commission Expires:

"OFFICIAL SEAL"
Carmen C. Escobar
Notary Public Arizona
Santa Cruz County
My Commission Expires
4/16/98